

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and having considered the briefs of the parties, the Appeals Board finds that the Award entered by the ALJ should be modified to a 9 percent loss of use of the forearm with a compensation rate of \$314.64 based on the agreed average weekly wage of \$471.94 for a September 12, 1997 accident date. The Appeals Board otherwise adopts the findings, conclusions and orders of the ALJ as its own as if specifically set forth herein.

Findings of Fact

(1) On January 14, 1997, claimant was lifting a case of six 1-gallon bottles of windshield washer fluid when it slipped. When she tried to regrasp the box she felt a pull in her wrist and hand area.

(2) Claimant continued working her regular job with respondent, but was feeling a pull and constant pain in her right wrist and thumb area. She was eventually provided medical treatment by respondent at OHS CompCare which included three weeks of physical therapy. Due to her ongoing symptoms, claimant was referred to orthopedic surgeon Bradley Storm, M.D. He diagnosed de Quervain's tendonitis and, following a course of conservative treatment, performed surgery on September 12, 1997.

(3) The deposition of the treating physician, Dr. Storm, was not taken and therefore the Appeals Board does not have the benefit of his testimony. Claimant testified that she believes the January 14, 1997 accident was the onset of her injury but that her subsequent work for respondent caused her condition to worsen. She denied having any prior right wrist or hand problems.

(4) At her attorney's request, claimant was examined by Dr. P. Brent Koprivica on August 6, 1998. He diagnosed claimant to have a symptomatic right de Quervain's syndrome that had been surgically released. In his opinion, this condition was not the result of a single accident. "The onset was with the specific traumatic injury of January 14th, 1997, but de Quervain's is a condition that is a cumulative type of problem. That is the reason why I recommended that she avoid repetitive pinching activities in particular and also it's consistent with what her clinical history was where she got some better, went back to work and she had recurrent problems and had to go back for further treatment, and I think that that's all consistent with an ongoing process."¹

(5) Using the Fourth Edition of the AMA Guides to the Evaluation of Permanent Impairment, Dr. Koprivica rated claimant's impairment as a 16 percent loss of use of the hand. However, the AMA Guides unlike the Kansas Act, do not assign impairments to the

¹ Deposition of P. Brent Koprivica, M.D., at 21.

level of the forearm. According to Dr. Koprivica, claimant's anatomic problem is in the first dorsal compartment of the wrist, which would put the impairment beyond the hand and into the forearm level. Dr. Koprivica said his 16 percent impairment rating to the right hand would also be a 16 percent impairment at the forearm level.

(7) Respondent sent claimant for an examination by Dr. Gary L. Baker, which was performed on February 3, 1999. He opined that claimant suffered a work related injury. Surgical treatment was somewhat, but not totally, successful. In his opinion claimant had permanent swelling and a permanent impairment. He rated claimant's impairment as 2 percent at the level of the wrist which he put at the 200-week level (forearm) for a Kansas claim because the injury was at the wrist joint. He did not recommend any restrictions or further medical treatment.

(8) Dr. Baker described claimant's injury as a cumulative trauma disorder with a gradual onset as a result of repetitive work related activity. "What I believe happened in the case of this lady is the following: She had an acute event which precipitated bleeding into that area, or a tear or something where body fluids that normally don't leak into that area did in fact go into that area, and that precipitated an inflammatory response. And following that event, the work-related repetitive activity that she did perform aggravated or made it worse."²

Conclusions of Law

Claimant bears the burden of proof to establish her right to an award of compensation and to prove "the various conditions on which the claimant's right depends."³ The Board must consider the entire record to determine whether claimant has satisfied the burden of proof. The Workers Compensation Act defines the terms "burden of proof" as "the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true."⁴

Functional impairment is the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the AMA Guides. At the time of claimant's injury, the Act required that functional impairment be based on the Fourth Edition of those Guides.⁵

² Deposition of Gary L. Baker, M.D., at 24.

³ K.S.A. 1997 Supp. 44-501(a).

⁴ K.S.A. 1997 Supp. 44-508(g); *see also*, Chandler v. Central Oil Corp., 253 Kan. 50, 57, 853 P.2d 649 (1993).

⁵ K.S.A. 1997 Supp. 44-510d(a)(23).

The Appeals Board, as a trier of fact, must decide which testimony is more accurate and/or more credible and must adjust the medical testimony along with the testimony of the claimant and any other testimony that might be relevant to the question of disability.⁶

The Board finds claimant has a 9 percent impairment of function to the right forearm as a result of her wrist injury. This conclusion is based upon the ratings of both Dr. Koprivica and Dr. Baker.

The Workers Compensation Act recognizes two classes of injuries other than those which result in death or total disability, and those are permanent disability to a scheduled part of the body and permanent partial general disability.⁷ Scheduled injuries are individually defined and described in K.S.A. 1997 Supp. 44-510d. The loss of use of a hand or a forearm is a scheduled injury.⁸

"When a specific injury and disability is a scheduled injury under the Workmen's Compensation Act, the benefits provided under the schedule are exclusive of any other compensation."⁹

The record establishes that claimant's injury is the result of cumulative or repetitive trauma and not a single accident. If the Appeals Board finds claimant sustained a series of accidents, the parties do not dispute the September 12, 1997 date that the ALJ used to calculate the award. Therefore, the Appeals Board will adopt September 12, 1997 as the ending date of the series and date of accident in this case. As noted by the ALJ, the parties stipulated to an average weekly wage of \$471.94 for that accident date. The Award, therefore, will be calculated using a compensation rate of \$314.64.¹⁰

The Kansas Workers Compensation Act provides that an injured worker is entitled to receive a maximum of 200 weeks of permanent partial disability benefits for a forearm injury.¹¹ As provided by Regulation,¹² the number of weeks of temporary total disability benefits that are due is subtracted from the 200 weeks and the resulting number is then multiplied by the functional impairment rating. In this case no temporary total disability is

⁶ Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

⁷ See, K.S.A. 1997 Supp. 44-510d; K.S.A. 1997 Supp. 44-510e.

⁸ K.S.A. 1997 Supp. 510d(a)(11) & (12). See also, K.A.R. 51-7-8(c)(4).

⁹ Berger v. Hahner, Foreman & Cale, Inc., 211 Kan. 541, 545, 506 P.2d 1175 (1973).

¹⁰ K.S.A. 1997 Supp. 44-510d(a).

¹¹ K.S.A. 1997 Supp. 44-510d(a)(12).

¹² K.A.R. 51-7-8.

due and, therefore, the 200 weeks is multiplied by the 9 percent impairment. This computation yields 18 weeks of permanent partial disability compensation that claimant is entitled to receive for her injury.

The Act further provides for future medical benefits and an unauthorized medical allowance of up to \$500.¹³ Claimant's need for additional medical treatment is disputed. Claimant testified that she is in need of additional treatment to relieve her ongoing symptoms and Dr. Koprivica agreed. However, the last physician to examine claimant, Dr. Baker, disagreed. He believed no further treatment was necessary. The Appeals Board believes that future medical treatment should not be foreclosed. But given the length of time that has passed since claimant was last examined, future medical treatment should be awarded upon application to and approval by the Director.

The record indicates that claimant has not incurred any unauthorized medical expense that is payable under the statutory allowance. But this benefit should likewise not be foreclosed in a running award. Claimant should be awarded unauthorized medical up to the statutory maximum, but this benefit is only payable upon presentation to respondent of an itemized statement from the physician or other health care provider.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Robert H. Foerschler dated November 17, 1999, should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Melba M. Herrera, and against the respondent, Circle K, and its insurance carrier, Travelers Property Casualty Company, for an accidental injury which occurred September 12, 1997, and based upon an average weekly wage of \$471.94 for 18 weeks of permanent partial disability compensation at the rate of \$314.64 per week or \$5,663.52, for a 9% scheduled injury to the forearm, which is ordered paid in one lump sum less any amounts previously paid.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of September 2000.

¹³ K.S.A. 1997 Supp. 44-510(c)(2).

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Timothy M. Alvarez, Kansas City, MO
Randall W. Schroer, Kansas City, MO
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director